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No. 93-1337

In The

Supreme Court of the United States

October Term, 1993

ENRIQUETO MARTE, et al.,

Petitioners,

v.

CHEVRON CORPORATION LONG-TERM DISABILITY PLAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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LIST OF PARENT COMPANIES AND SUBSIDIARIES

Respondent Chevron Corporation Long-Term Disability Plan Organization is a Delaware non-stock corporation, with no parent companies or subsidiaries. Respondent Chevron Corporation Long-Term Disability Plan is not a corporate entity, and similarly has no parent companies or subsidiaries. Respondent Chevron Corporation has no parent company; its non-wholly owned subsidiaries are Cornwallis Arctic Oils Limited and Crest Exploration Limited.

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BRIEF IN OPPOSITION

Respondents respectfully request that the petition be denied. This case presents no novel question of law, nor does it present a ruling on an issue of law that is in conflict with the law of any other circuit. The unanimous decision of the Ninth Circuit, which is unreported, routinely applies the legal principles of this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), in a manner that is consistent with the case law in the Ninth Circuit and every other circuit. There is no important issue that warrants the attention of this Court, and in

any event the decision below was plainly correct in all respects.

STATEMENT OF THE CASE

Petitioners are four seamen who worked for Chevron U.S.A. Inc.'s Marine Vessels Department as crew members on oil tankers. They were awarded benefits under the Chevron Corporation Long-Term Disability Plan ("LTD Plan" or "Plan"), but contend that they are entitled to larger benefits than they received. They assert that the Plan Administrator improperly calculated their benefits on the basis of only their regular, straight-time hours, without taking into account their overtime hours. They filed suit in the district court against the LTD Plan, the Chevron Corporation Long-Term Disability Plan Organization (a separate corporation which serves as the Plan Administrator of the LTD Plan), and Chevron Corporation (the parent of Chevron U.S.A. Inc.). The action was brought under 29 U.S.C. § 1132(a)(1)(B), the provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, that authorizes a civil suit to recover plan benefits.

A. The LTD Plan.

The LTD Plan generally provides that a disabled employee is entitled to a monthly plan benefit that will provide 60 percent of the employee's monthly "Earnings"

immediately prior to the commencement of disability.[1] The Plan defines "Earnings" as:

> the straight-time wages or salary payable to an Employee for the Regular Work Schedule . . .

The Summary Plan Description ("SPD") provided to all employees contained this same definition, except that the SPD used the term "Regular Pay" in place of "Earnings." The LTD Plan defines "Regular Work Schedule" as:

> the continually recurring pattern of scheduled work established and changed as necessary by the Corporation for a job in each work week or period of work weeks to meet operating needs.

The Plan gives the authority to interpret these provisions to the Plan Administrator. The Plan provides that the Plan Administrator:

> shall make such rules, regulations, interpretations, and computations and shall take such other actions to administer the Plan as it may deem appropriate.

At all times, the Plan Administrator interpreted the definition of "Earnings" to include only an employee's regular wages and *not* to include overtime hours.

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[1] As petitioners acknowledge (Pet., p. 6), the Plan does not promise to *pay* 60% of the employee's predisability earnings, but only to assure that each employee will have income (including Social Security and other benefits) at that level. Despite petitioners' admitted understanding of these offsets, they continually and misleadingly express their benefit amounts *after* the offsets. *See, e.g.*, Pet., p. 4 ("benefit averaging 53 cents a month"), p. 6 n.2 (net benefit was 0% of earnings).

This interpretation was consistent with the commonly understood meaning of "straight-time" wages, as referring only to regular pay. *See, e.g.*, H. Roberts, Roberts' Dictionary of Industrial Relations 512 (Rev. ed. 1971) (defining "straight-time pay" as "[r]egular time or wage payments, excluding overtime or other premiums"). It was also based on the wage and "hours of work" provisions contained in collective bargaining agreements between Chevron and the Sailors' Union of the Pacific, which governed the terms and conditions of petitioners' employment. The agreements set forth the schedule of the "regular hours of work" – typically 40 hours per week – for each category of employee, and provided that the employees would be paid a specified "Monthly Wage Rate" for these hours. The agreements further contained a separate hourly rate for any overtime, which could be worked only with the authority of the master or an authorized representative.

Petitioners would typically work two to three months aboard ship, during which time they would earn their Monthly Wage Rate, plus a considerable amount of overtime. Then, after these two to three months aboard ship, they would be at home for a month or more, doing no work under the labor contract but still collecting the Monthly Wage Rate.[2]

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[2] Petitioners ignore these months out of work in order to present the distorted figures in their calculations. For example, petitioners assert that Mr. Kauka's predisability earnings were $4,741.60 per month. Pet., p. 6 n.2. That figure is based solely on two of his highest grossing months in 1986 when he was working aboard ship, and ignores that Mr. Kauka worked no overtime hours at all in two of the six months prior to his disability

B. Funding for the Plan.

The Plan Administrator's interpretation of "Earnings" as including only regular, straight-time wages was reflected in the manner in which the Plan was funded. The version of the Plan in effect prior to July 1, 1986 was funded solely by employee contributions, which were made on the basis of the employee's covered payroll. After July 1, 1986, Chevron funded the first $25,000 of annual covered payroll for each employee, and employees could elect to make contributions to cover payroll in excess of $25,000.

At all times prior to July 1, 1986, the employee contributions to the Plan made by Chevron U.S.A. seamen (including petitioners) were based upon a calculation that defined their "Earnings" under the Plan as their Monthly Wage Rate, and not overtime wages. After July 1, 1986, only petitioners Marte and Kauka were still participants in the Plan. Both Marte and Kauka elected to have the company deduct amounts from their paychecks to fund LTD Plan coverage for their covered payroll over $25,000. Despite the fact that both had total annual income

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in 1986. In appealing Mr. Kauka's benefits determination, petitioners' counsel himself represented that Mr. Kauka's average monthly pay in 1986, including overtime, was considerably less.

Similarly, the earnings figures for the other petitioners are distorted by this selective use of the highest grossing months. Mr. Aruta worked no overtime hours at all for three of the six months prior to his disability. Mr. Marte worked no overtime for virtually all of the two months prior to his disability. Mr. Almeria worked no overtime hours in two of the three months prior to his disability, nor in four of the six months prior to his disability.

(including overtime wages) in excess of $25,000, no payroll deductions were ever imposed on them during this period, because their Monthly Wage Rate produced covered payroll below $25,000. Thus, the amounts deducted from petitioners' paychecks were at all times consistent with the determination that their Plan "Earnings" encompassed only their monthly straight-time wages, but not their overtime wages.

C. Plan communications.

The Plan Administrator's interpretation of "Earnings" as not including overtime hours was widely disseminated to the seamen since the Plan's inception, through various meetings and presentations explaining the operations of the Plan. Officials in the Chevron Shipping personnel department gave presentations to the employees about benefits in 1971, 1977, 1981 and 1986. The majority of these presentations were aboard ship, and the presentations were scheduled at various times so that each seaman would be able to attend at least one session. At these meetings, it was explained to the seamen that their benefit under the LTD Plan would be based upon only their Monthly Wage Rate under the labor contract and not any overtime wages.

Chevron seamen also received individual benefits counseling when they were first hired and whenever they came into the office for an individual consultation. The personnel department's policy was to run through the calculation of the seaman's LTD Plan benefits and to show that the amount of such benefits was based on the Monthly Wage Rate under the labor contract.

As discussed above, the Plan also disseminated to all employees Summary Plan Descriptions – booklets that contained the general features of the Plan. The booklets expressly state that the Plan will guarantee 60 percent of an employee's "regular pay." "Regular Pay" is specifically defined in the booklets in the same manner as the term "Earnings" is defined in the Plan itself ("straight-time wages or salary"). Moreover, the booklets caution that the term "regular pay" has a specific meaning to be found in the definitions section.

The booklets also urge employees to refer to their payroll slips for information about their benefits. The payroll slips furnished to petitioners indicated that benefits under the LTD Plan were keyed to the Monthly Wage Rate, not to total wages or overtime wages. Each payroll slip set out the employee's "Regular Wages" (which consisted of the Monthly Wage Rate) and "Regular Wages Plus Overtime" on separate lines. The payroll slips also reflected deductions taken, and each applicable deduction was cross-referenced to the income line on which the deduction was based. The payroll deduction for the LTD Plan cross-referenced the line item for Regular Wages (*not* Regular Wages Plus Overtime) to reflect the fact that the employee's covered earnings under the Plan were based solely on the Monthly Wage Rate and not on overtime hours.[3]

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[3] Petitioner Kauka misleadingly asserts that the payroll slips defined his "Disability Insurance Plan Base" as his total income, including overtime. Pet., p. 7. As shown by the record below, the payroll slips contained a separate entry explicitly labeled "Long Term Disability Plan," which cross-referenced the line for petitioners' regular wages, *excluding* overtime. The

Although petitioners did not dispute below that the foregoing communications were made, they professed not to have remembered or understood them. Petitioners conceded that they never read or relied on the Plan or the Summary Plan Description booklets. They admitted that their claim is based solely on an "assumption" that overtime hours would be included in their "Earnings."

D. Collective bargaining negotiations.

Petitioners were represented by the Sailors' Union of the Pacific with respect to negotiations involving the terms and conditions of their employment. The union agent representing petitioners in these negotiations with Chevron was at all times aware that the seamen worked a substantial number of overtime hours and earned substantial overtime wages. He was also aware that these overtime wages were excluded in determining benefits under the LTD Plan, because they were not included in the regular monthly wage. The union from time to time expressed to Chevron negotiators its desire to have overtime wages included as part of the regular monthly wage rate so that the seamen's disability benefits would be increased. The Chevron negotiators were willing to grant this concession only if the union agreed to wage reductions under the contract to maintain the cost of the total compensation paid to the seamen. The union never formally demanded this change, and it was never made.

Summary Plan Descriptions explained that the "Long Term Disability Plan" referred to the Chevron LTD Plan, whereas the "disability insurance plan" referred to separate disability insurance provided to California employees only.

Accordingly, petitioners' collective bargaining representative negotiated a total compensation package for petitioners with the explicit understanding that overtime wages would not be included in the calculation of LTD Plan benefits.

E. The determination of petitioners' claims for benefits under the LTD Plan.

Petitioners became disabled between 1983 and 1987 and applied for benefits under the LTD Plan. In accordance with its longstanding interpretation of the Plan and its practice in administering it, the Plan Administrator awarded benefits based on the petitioners' regular monthly wages, but not including their overtime pay.[4] Petitioners' benefits were thus set at 60 percent of their straight-time wages prior to the disability, meaning 60 percent of each employee's Monthly Wage Rate under the collective bargaining agreement.[5]

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[4] Petitioners refer to a recommendation made by CIGNA. Pet., p. 7. CIGNA was not the Plan Administrator, but served as an initial claim administrator. CIGNA initially recommended in the case of Mr. Kauka that his "Earnings" be calculated to include his average overtime hours. However, after discussing the matter with the Chevron LTD Plan Organization (the Plan Administrator) and after receiving a copy of the petitioners' collective bargaining agreement, CIGNA recommended that the petitioners' "Earnings" be calculated to include only their Monthly Wage Rate and not overtime hours.

[5] The guaranteed monthly benefit to Mr. Marte was $888, to Mr. Kauka was $1,161, to Mr. Almeria was $1,170, and to Mr. Aruta was $1,089.

F. Proceedings below.

Petitioners filed suit in the district court, which ruled in favor of petitioners on cross-motions for summary judgment. The court acknowledged that the case turned solely on the proper interpretation to be given to the Plan's definition of "Earnings," and that the Plan expressly gives the Plan Administrator the power to make such interpretations. *Id.*, p. A-13, A-15. However, the district court refused to apply an abuse of discretion standard of review, holding that deference to the Plan Administrator's decision is not required where the decision involves "only an application of plan language." *Id.*, p. A-14. Applying *de novo* review, and holding that any ambiguities in the Plan must be resolved against respondents, the court rejected the Plan Administrator's interpretation and concluded instead that "Earnings" should be read to include not only straight-time wages, but also overtime hours multiplied by a purported straight-time *rate*. *Id.*, pp. A-15 to A-17.

In an unreported decision, the court of appeals reversed. The court held that under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), an "abuse of discretion standard [applies] when reviewing the action of an ERISA plan administrator if the plan confers 'discretionary authority to determine eligibility for benefits or to construe the terms of the plan.' " Pet., p. A-5 (quoting *Firestone*, 489 U.S. at 115). The court found that the Plan in this case "clearly" granted such authority because of its express provision authorizing the Plan Administrator to make such "interpretations . . . as it may deem appropriate." *Id.*, p. A-5 to A-6.

Reviewing the matter under the abuse of discretion standard, the Ninth Circuit found that the language of the Plan was "unambiguous and that 'straight time' refers to the regular 40 hour work week." *Id.*, p. A-7. The court also ruled that, even if the language were ambiguous, a decision in favor of respondents would still be required because petitioners had failed to satisfy their burden of showing that the Plan Administrator's interpretation clearly conflicted with the Plan's language. *Id.*

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE PLAN LANGUAGE NECESSARY TO TRIGGER ABUSE OF DISCRETION REVIEW. THIS COURT HAS HELD, AND THE COURTS OF APPEALS HAVE AGREED, THAT AN ABUSE OF DISCRETION STANDARD OF REVIEW IS REQUIRED WHEN THE PLAN GIVES POWER TO THE PLAN ADMINISTRATOR TO INTERPRET THE PLAN.

Petitioners argue that the court of appeals' unreported decision applying an abuse of discretion standard of review conflicts with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and with the decisions of other courts of appeals, principally those of the First and Sixth Circuits. Pet., p. 12. This contention rests on a fundamental misunderstanding of the holding in *Firestone*, and on a serious misreading of the numerous court of appeals' decisions that have uniformly interpreted and applied *Firestone*.

This Court granted certiorari in *Firestone* to resolve the issue of the "appropriate standard of review in [ERISA] § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." 489 U.S. at 108. Prior to *Firestone*, the courts of appeals had generally applied an "arbitrary and capricious" standard of review, based on an analogy to a provision of the Labor Management Relations Act, 1947. 61 Stat. 157, 29 U.S.C. § 186(c). This Court held, however, that, because "ERISA abounds with the language and terminology of trust law" (489 U.S. at 110), the standard of review should be determined in accordance with trust principles. Under those principles,

> a deferential standard of review [is] appropriate when a trustee exercises discretionary powers. See Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion"). See also G. Bogert & G. Bogert, Law of Trusts and Trustees § 560, pp. 193-208 (2d rev. ed. 1980). *A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.*

489 U.S. at 111 (emphasis added).

On the other hand, when a trust instrument is silent, the Court held that "courts construe terms in trust agreements without deferring to either party's interpretation." *Id.* at 112. The Court found this latter *de novo* standard applicable in *Firestone* because there was no evidence in that plan that "the administrator has the power to construe uncertain terms." *Id.* at 111.

In contrast to the plan at issue in *Firestone*, the LTD Plan in this case explicitly empowers the Plan Administrator to:

> make such rules, regulations, *interpretations* and computations and [to] take such other action to administer the Plan *as it may deem appropriate.*

Given this express power to "construe the terms of the plan" (*Firestone*, 489 U.S. at 115), the court of appeals properly ruled that an abuse of discretion standard of review was appropriate and, applying that standard, upheld respondents' interpretation of "straight-time wages" as meaning only regular pay, excluding overtime, as reasonable and consistent with the Plan language.

The Ninth Circuit's application of the abuse of discretion standard of review in this case is consistent not only with *Firestone*, but also with the decisions of every other court of appeals to consider the issue. Since *Firestone* was decided, the courts of appeals have in numerous decisions repeatedly and consistently held that language granting to a plan administrator the power to interpret, such as the language found in the LTD Plan, is sufficient to require an abuse of discretion standard of review. *See, e.g., Nazay v. Miller*, 949 F.2d 1323, 1335 (3d Cir. 1991) (administrator had authority to "interpret and construe the provisions of the Plan"); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989) (administrator given power "[t]o determine all benefits and resolve all questions pertaining to the administration, interpretation and application of Plan provisions"); *Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 55 (5th Cir.), *cert. denied*, 498 U.S. 939 (1990) (administrator authorized "to construe all terms, provisions, conditions and limitations of the Plan and the

Trust"); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 688 (7th Cir. 1992) (administrator "shall determine all questions arising in the administration, interpretation and operation of the Plan"); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) (trustees empowered "to construe and interpret the plan"); *Cox v. Mid-America Dairymen, Inc.*, 13 F.3d 272, 274 (8th Cir. 1993) (administrator "shall interpret the Plan and shall determine all questions arising in the administration, interpretation and application of the Plan"); *Lakey v. Remington Arms Co.*, 874 F.2d 541, 544 (8th Cir. 1989) (administrator authorized to "interpret the more usual situations that may arise in the application of the . . . policy").

Contrary to petitioners' assertion, the law in the First and Sixth Circuits is fully in accord. Petitioners rely upon *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580 (1st Cir. 1993), and *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989). In both cases, however, the court's ruling was simply that there was no language at all conferring authority upon the administrator to determine eligibility or construe the plan. *Rodriguez-Abreu*, 986 F.2d at 584;[6] *Brown*, 876 F.2d at 550. Where such language exists, the First and Sixth Circuits have applied an abuse of discretion of standard of review, in accord with the explicit holding in *Firestone* and on the basis of the same analysis applied by all of the other courts of appeals. *See*

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[6] In *Rodriguez-Abreu*, the plan contained language granting discretionary authority to the Named Fiduciaries under the Plan. The court found this immaterial in that case, however, because the decision to deny benefits was not made by a Named Fiduciary but by a different person who was not given such authority. 986 F.2d at 584.

Curtis v. Noel, 877 F.2d 159, 161 (1st Cir. 1989) (administrator empowered to determine "which Employees are eligible to participate in the Plan" and to "provide all parties dealing with the Plan an interpretation of Plan provisions on request"); *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 459 (6th Cir. 1991) ("[f]inal decisions shall be made by the Company as to the interpretation and application of this policy"); *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir.), *cert. denied*, 495 U.S. 905 (1989) (administrator "shall interpret the Plan and shall determine all questions arising in the administration, interpretation and application of the Plan").[7]

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[7] The plans in *Callahan* and *Davis* had language stating that the administrator's determination would be "final" or "conclusive." The court, however, did not place any particular reliance on this language or indicate that its decision would have been different absent that language. Respondents are not aware of any decision, including this Court's decision in *Firestone*, holding that such language is required. To the contrary, the courts of appeals have properly found an abuse of discretion standard to be required even without identifying any language making the administrator's interpretation final, conclusive or binding. *See, e.g., Dytrt v. Mountain State Tel. and Tel. Co.*, 921 F.2d 889, 894 (9th Cir. 1990) (power "to determine eligibility or to construe the terms of the plan"); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) (power "to construe and interpret plan"); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 688 (7th Cir. 1992) (power to "determine all questions arising in the administration, interpretation and operation of the Plan"); *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1014 (5th Cir. 1992) (responsibility for "development of procedures to implement the policy, for interpretation of policy, and for coordination of administration"); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989) (power to "resolve all questions pertaining to the administration, interpretation and application of Plan provisions").

Petitioners assert that the Ninth Circuit, along with various other courts of appeals, has improperly adopted a theory of "implied discretion." Pet., p. 4. Petitioners ignore, however, that the application of an abuse of discretion standard in this case, as in the numerous other cases decided by the courts of appeals, rests not on any implied powers, but on an *express* grant of power to the administrator to interpret the plan. Thus, the Plan in this case explicitly empowered the plan administrator to make such "interpretations . . . as it may deem appropriate." This is precisely the type of language that this Court held was sufficient to invoke the abuse of discretion standard when it stated that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Firestone*, 489 U.S. at 111.

To the extent petitioners are arguing that a plan cannot confer discretionary authority, and an abuse of discretion standard therefore cannot be applied, unless the plan actually uses the word "discretion," that argument finds no support in *Firestone* and has been consistently and properly rejected by the courts of appeals. There is no suggestion in *Firestone* that the appropriate standard of review turns on such formalism. Rather, the question is simply whether the governing instrument grants to one party the power to interpret the plan or to determine eligibility for benefits. If it does, longstanding principles of trust law dictate that that party's determination be given deference in any subsequent court proceedings. *See Firestone*, 489 U.S. at 111. Thus, in a decision relied upon by the court below, the Fourth Circuit held:

> There are obviously no magic words required to trigger the application of one or another standard of judicial review. . . . [I]t instead need only appear on the face of the plan documents that the fiduciary has been "given [the] *power* to construe disputed or doubtful terms" . . . in which case "the trustee's interpretation will not be disturbed if reasonable."

De Nobel, 885 F.2d at 1187 (quoting *Firestone*, 489 U.S. at 111) (emphasis in original); *accord Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1453-54 (D.C. Cir. 1992); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 637 (5th Cir.), *modified*, 979 F.2d 1013 (5th Cir. 1992); *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1572 n.2 (6th Cir. 1992).

II. APPLYING AN ABUSE OF DISCRETION STANDARD OF REVIEW DOES NOT VIOLATE 29 U.S.C. § 1102.

There is no merit to petitioners' contention that 29 U.S.C. § 1102(b)(4) prohibits the application of an abuse of discretion standard of review.[8] Section 1102(b)(4) requires that benefit plans "specify the basis on which payments are made to and from the plan." The Plan in this case contains detailed provisions that clearly satisfy this requirement. As discussed above, the Plan provides that an employee's monthly benefit for disability will be an amount that, when combined with other specified

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[8] This argument was not made in either the district court or the court of appeals. With respect to the standard of review, petitioners' argument was simply that the Plan language granting the power to interpret was insufficient under *Firestone* to invoke the abuse of discretion standard.

sources of income, equals 60% of the employee's predisability earnings. Earnings are then specifically defined as "the straight-time wages or salary payable to an Employee for the Regular Work Schedule . . . "

Petitioners did not argue below that these provisions, which clearly set forth the basis upon which benefits would be paid, are insufficient to satisfy section 1102(b)(4). Nor do petitioners make that argument in this Court. Their contention is rather that, despite the obvious sufficiency of the Plan itself, section 1102(b)(4) is violated when the courts review a benefits determination under an abuse of discretion standard rather than a *de novo* standard.

This argument is a non-sequitur. The standard of review applied by a court when a benefits determination is challenged has nothing to do with whether the plan adequately specifies the manner in which payments will be made. As this case demonstrates, even where detailed plan language exists, disputes can arise over the proper interpretation of that language. When that occurs, the interpretation issue must be resolved. *Firestone* simply held that, where the plan itself empowers the administrator to make that interpretation, the courts will uphold the administrator's interpretation if it is reasonable, rather than review the matter *de novo*. The selection of this standard of review does not render the plan language non-specific, any more than would *de novo* review (which would involve the same interpretation, except that it would be done by the court without deference to the administrator's interpretation). If petitioners' argument were correct, it would mean that *any* court review of a

benefits denial based on plan interpretation would violate section 1102(b)(4). That obviously is not the law.

Petitioners assert that applying an abuse of discretion review may result in the sustaining of a benefits determination that conflicts with the "apparent or obvious meaning of a plan," which petitioners claim would be contrary to section 1102(b)(4). Pet., p. 20. Under *Firestone*, however, the courts retain ample power to correct an interpretation that is plainly or obviously inconsistent with the plan. As the Ninth Circuit itself has recognized, an interpretation that "clearly conflicts with the plain language of the plan" constitutes an abuse of discretion and will not be upheld. *Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991); *see also Firestone*, 489 U.S. at 111 (an interpretation will be upheld only if it is "reasonable").

Petitioners also argue that the court of appeals' review in this case "abrogated" the requirements of section 1102(b)(4) by supposedly not giving effect to the Plan language. Pet., p. 23. This, however, is nothing more than an argument that the court erred on the specific facts of this case, not that it misinterpreted *Firestone* or reached a decision in conflict with that of the other courts of appeals. Even beyond this, though, the court of appeals' decision was in fact correct, as the Plan Administrator's interpretation of the phrase "straight-time wages" according to its commonly understood meaning as excluding overtime was plainly a reasonable one. Even the district court, which ruled against respondents under an erroneous *de novo* standard, stated during argument that the interpretation issue was a "very, very close question either way," and was not able to identify any specific defects in the Plan Administrator's interpretation.

Finally, petitioners suggest that plan interpretation should never be considered a discretionary act within the meaning of *Firestone*. Pet., pp. 19-20. This argument, however, is directly contrary to *Firestone* and to virtually every other case in this area – all of which recognize that the interpretation of doubtful or disputed language in a benefit plan involves the exercise of discretion and requires application of an abuse of discretion standard of review when the administrator is empowered by the plan to interpret it. In *Firestone*, the Court held that "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers." 489 U.S. at 111. The first example given of a "discretionary power" is the "power to construe disputed or doubtful terms." *Id.* Indeed, the Court expressly stated that its analysis applied to "actions challenging denials of benefits *based on plan interpretations*" (*id.* at 108; emphasis added), which is precisely what the present case involves. The ultimate holding of *Firestone* is that a *de novo* standard will apply "unless the benefit plan gives the administrator or fiduciary *discretionary authority* to determine eligibility for benefits or *to construe the terms of the plan.*" *Id.* at 115 (emphasis added).

Petitioners identify no authority or sound policy for any contrary result. To the contrary, the courts of appeals are unanimous in applying an abuse of discretion standard to review a benefits determination where, as in this case, the sole issue is the propriety of an interpretation of plan language made by a plan administrator that had been given the power to interpret the plan. *See, e.g., De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989) (abuse of discretion standard applied in case involving

"nothing more than a dispute over the . . . interpretations of unclear language found in the plan documents"); *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (abuse of discretion standard applied where dispute was over proper interpretation of provision excluding from earnings payments that "would not ordinarily be considered compensation for job-related services"); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058-59 (7th Cir. 1990) (abuse of discretion standard applied where question was meaning of plan requirement that medical expenses be "incurred" while coverage was in force); *Eley v. Boeing Co.*, 945 F.2d 276, 279-80 (9th Cir. 1991) (applying an abuse of discretion standard to a claim that a plan administrator had improperly interpreted the term "diagnostic test").

III. THE NINTH CIRCUIT DID NOT "IMPLY DISCRETION" TO A PERSON WITHOUT AUTHORITY, AND THERE IS NO CONFLICT AMONG THE CIRCUITS INVOLVING THIS ISSUE.

Petitioners' argument that *de novo* review is required because the court of appeals "implied discretion" to a person without authority to exercise discretion (Pet., pp. 23-24) is based upon a misunderstanding of the facts. The court of appeals did not review a discretionary determination of a person who had no discretion under the Plan. The interpretation of the Plan Administrator was reviewed under an abuse of discretion standard because the Plan expressly conferred such discretion upon the Plan Administrator. There is accordingly no conflict among the circuits on this point.

Petitioners' argument arises from the fact that two of the four petitioners, Aruta and Almeria, became disabled under the 1981 Plan. This Plan provided that appeals of claims were to be reviewed by a panel of three reviewers. The subsequent Plan, enacted in 1986, provided that appeals were to be reviewed by a single claims reviewer. All petitioners – including Aruta and Almeria – filed their appeals in 1989. These appeals were reviewed by a single claims reviewer in accordance with the 1986 Plan procedures in effect at the time.

Petitioners contended below, and contend here, that the review by a single reviewer constituted a "violation" as to Aruta and Almeria, and requires that a *de novo* standard of review be applied to the claims of these two petitioners (but presumably not to the claims of the other two petitioners). Pet., pp. 23-24. The Ninth Circuit rejected this contention "for any of three reasons." *Id.*, p. A-6. First, it noted that the result should not have been different regardless of the number of reviewers, since the reviewers would be applying the interpretation of the Plan Administrator. Under both Plans, the Plan Administrator had discretion to interpret Plan provisions. Moreover, the Plan Administrator's interpretation was established well before and independent of any appeal by petitioners, as evidenced by the contribution levels in effect from the outset of their employment. *Id.*, pp. A-6 to A-7. Second, the court held that Aruta and Almeria had no vested right to any particular plan procedure. *Id.*, p. A-7, citing cases. Third, the court noted that petitioners had offered no authority indicating that a procedural breach of plan terms automatically imposes *de novo* review. *Id.*

Without directly addressing any of these three bases for the Ninth Circuit's decision, petitioners claim that this ruling is contrary to *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580 (1st Cir. 1993). There the court held that the plan administrator did not have discretionary authority to determine whether the claimant was eligible for disability benefits, because the plan conferred such discretion only on the "Named Fiduciaries," and not on the plan administrator. *Id.* at 584.[9] *Rodriguez-Abreu* thus indicates that *de novo* review will apply in assessing the conduct of a plan official to whom the plan grants no discretion.

That ruling has no application here. In this case, the Plan expressly grants authority to the Plan Administrator to interpret the Plan, and the Administrator in fact exercised that power by making known, prior to and independent of the petitioners' appeals, its interpretation of the language of the Plan. That interpretation is thus properly reviewed under the abuse of discretion standard.

IV. THE NINTH CIRCUIT DID NOT USE PAROL EVIDENCE TO MODIFY THE TERMS OF AN UNAMBIGUOUS PLAN, AND THERE IS NO CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

Petitioners' final contention is that the Ninth Circuit improperly relied upon parol evidence to modify the

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[9] The standard of review made no difference to the outcome of the case, which was decided against the claimant because he had executed a valid release of claims against the company. 986 F.2d at 585-88.

written terms of an unambiguous Plan, contrary to the provisions of ERISA and the rulings of other circuit courts. Pet., pp. 25-28. This contention contains at least three flawed premises.

First, petitioners erroneously assume that the Plan language unambiguously provides for the payment of benefits at levels sought by them. In fact, the Ninth Circuit decided exactly the opposite. The court expressly found that "the language of the plan is unambiguous" in supporting the Plan Administrator's interpretation. Pet., p. A-7.[10]

Second, petitioners erroneously assume that the Ninth Circuit considered extrinsic evidence in order to determine the meaning of this Plan language. In fact, when the court reviewed the language of the Plan itself, it found – without reference to any extrinsic evidence – that the Plan language was unambiguous. *Id.* Petitioners attempt to confuse this point by directing attention to a portion of the court's opinion that dealt with the appropriate standard of judicial review, rather than the meaning of the Plan's language. Pet., p. 25, citing Ninth Circuit decision at pages A-6 to A-7. As discussed above, petitioners had asserted that, because the appeals of two of the petitioners were decided by a single reviewer instead

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[10] Petitioners describe the district court as holding that "the benefit amount was controlled by unambiguous plan language" that supported petitioners' claim. Pet., p. 26 n.10. That is inaccurate. The district court found the Plan language to be ambiguous and selected its own interpretation at least in part because it "resolves the reasonable ambiguities in favor of plaintiffs." *Id.*, p. A-17.

of a panel of three, a *de novo* standard of review should apply. It was in the course of rejecting this argument that the court referred to the consistency between the premiums collected and the benefits awarded to petitioners. *Id.*, p. A-6.

Third, petitioners erroneously assume that the court of appeals' ruling "modified" the Plan language. The court did not "modify" the Plan, which would have been the case had the court held that, although the Plan itself provided one thing, that meaning had been changed by some other act or writing. The court instead held that the Plan itself unambiguously provided for benefits based only on regular pay, excluding overtime. As the Seventh Circuit has recognized, "[i]nterpretation and modification are different, and the power to do the first is not qualified by denial of the power to do the second." *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990).

Because the court of appeals did not use extrinsic evidence to modify unambiguous Plan language, the conflict among the circuit courts that petitioners hope to manufacture never materializes. Petitioners cite several cases from various circuits to the effect that unambiguous plan documents may not be modified by extrinsic evidence. *See* Pet., pp. 26-27 and cases cited. The law in the Ninth Circuit is the same. In *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821-22 (9th Cir. 1992), the court held that a plaintiff cannot maintain an equitable estoppel claim against a defendant that would effectively modify the unambiguous written terms of a plan. This is essentially the same rule that prevails in the other

circuit courts cited by petitioners. There is accordingly no conflict among the circuits for this Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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